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14. ABSTRACT The People's Republic of China (PRC) has made extraordinary diplomatic efforts to assure regional powers and the broader international community that its rise is peaceful, yet it has demonstrated a pattern of excessive claims, aggressive military action, and coercive diplomatic posturing over disputed territories. This paper will examine how the PRC has adopted the concept of legal warfare to shape international opinion and revise interpretation of international law. This paper argues that the PRC attempts to misapply the rule of law to exercise greater authority over military activities, and control access to its littoral waters. Beijing has enacted domestic legislation that is inconsistent with international maritime law, and dismissed decades of State practice to pursue its regional aims. The PRC's strategy of sea denial runs counter to the United States' doctrinal commitment to freedom of navigation and overflight rights, and regional security and stability. This paper argues the dangers of allowing the PRC to revise the long established norms of international maritime law. It concludes with measures the United States may take, in cooperation with regional partners, to ensure all nations preserve their lawful rights in the global maritime commons.					
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Lawfare in the Near Seas: How China's Maritime Claims Impact Regional Security

by

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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27 OCT 2010

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Abstract

*"To subdue the enemy without fighting is the acme of skill."
- Sun Tzu (c. 6th century BC)*

The People's Republic of China (PRC) has made extraordinary diplomatic efforts to assure regional powers and the broader international community that its rise is peaceful, yet it has demonstrated a pattern of excessive claims, aggressive military action, and coercive diplomatic posturing over disputed territories. This paper will examine how the PRC has adopted the concept of legal *warfare* to shape international opinion and revise interpretation of international law. This paper argues that the PRC attempts to misapply the *rule of law* to exercise greater authority over military activities, and control access to its littoral waters. Beijing has enacted domestic legislation that is inconsistent with international maritime law, and dismissed decades of State practice to pursue its regional aims. The PRC's strategy of sea denial runs counter to the United States' doctrinal commitment to freedom of navigation and overflight rights, and regional security and stability. This paper argues the dangers of allowing the PRC to revise the long established norms of international maritime law. It concludes with measures the United States may take, in cooperation with regional partners, to ensure all nations preserve their lawful rights in the global maritime commons.

INTRODUCTION

The People's Republic of China's (PRC) ascendancy to world power status has caused its neighbors to worry about how it will wield that power. Beijing has made extraordinary efforts to assuage any doubts that China's rise is peaceful, yet it has sometimes resorted to aggressive legal maneuvering, diplomatic posturing, and military action against rival powers over disputed ocean territories. Beijing is willing to misapply international law to assert its extra-territorial claims in the three China Seas, or *near seas*,¹ which include the East China Sea, Yellow Sea, and South China Sea. China's application of legal warfare (*lawfare*)² to gird its excessive maritime claims is not simply resource driven, but indicates China's strategic concerns with regard to sovereignty and national security.³

While Beijing does not publish the equivalent of the U.S. *National Security Strategy*, it does communicate strategy and policy via *white papers*, press statements, and scholarly publications.⁴ From these pronouncements, it may be possible to make some assumptions concerning Beijing's strategic objectives. The PRC appears willing to wrest control of the maritime commons through *legal warfare* to pursue its regional interests. Beijing's practice misapplies international law and demands all foreign military activity be subservient to the national laws of China. The PRC argument presents a direct challenge to the longstanding freedoms provided by the Law of the Sea; if realized, it would set a dangerous precedent that could have a destabilizing effect in the region and throughout the broader maritime world.

(All notes appear in shortened form. For full details, see the appropriate entry in the Bibliography)

¹ Nan Li, "The Evolution of China's Naval Strategy and Capabilities" 144-145

² Charles J. Dunlap, Jr., "Lawfare Today," Yale Journal of International Affairs (Winter 2008), 146

³ Peter A. Dutton, personal interview with the author, October 18, 2010

⁴ Office of the Secretary of Defense, *Annual Report to Congress*, 13

Counterargument - A Chinese Perspective

China has shown the world that its rise is peaceful. Although it has territorial disputes in its near seas, it has attempted to resolve those disagreements peacefully and on a bilateral basis. It has been a number of years since the last violent military clash occurred over disputed territories.⁵ It also is reasonable to consider that China has embraced many aspects of international maritime law as understood under the current international system. China's practice is not very different from the practices of the other nations involved in the territorial disputes. For example, all parties to the current disputes have unilaterally adopted the straight baseline method to enlarge their own maritime jurisdictions to the detriment of rival states.⁶ Likewise, many coastal States have adopted national laws which govern the waters under their jurisdictional authorities granted by the Convention. Beijing has adopted a policy to balance its sovereignty, economic, and security interests.⁷

The U.S. is a non-State-party to the Convention on the Law of the Sea, and a non-resident-State in the Asian hemisphere. It is external to the maritime disputes in the region, and its attempts to interject itself in the deliberations are not welcome. The U.S. position ignores the new maritime order which was established under the aegis of the United Nations. The provisions under the Convention have created a system of regulation under coastal State jurisdiction; the *high seas* are a thing of the past - they no longer exist. China is a coastal State and a major power - and will fulfill its obligations as such. The PRC is committed to building a harmonious Asia, and to reforming the international system of maritime law in a responsible manner, with the objective to make it fairer and more equitable for all States.

⁵ The U.S. Energy Information Administration, "Country Analysis Briefs"

⁶ Guoxing Ji, "Maritime Jurisdiction in the Three China Seas", 17

⁷ Mingjiang Li, "China maritime Cooperation in East Asia"

The Law of the Sea

Since the age of sail, operations on the high seas have been guided by the universal principle of Freedom of the Seas (*Mare Liberum*).⁸ This fundamental principle effectively limited coastal nations' rights and jurisdictions to a narrow band of littoral waters called the *territorial sea*, and proclaimed the remainder free to all and belonging to none as a global maritime commons.⁹ This arrangement continued well into the twentieth century - until the international community crafted the United Nations Convention on the Law of the Sea (UNCLOS) in 1982 to be the acceptable legal code governing a new maritime order.¹⁰ It is useful to understand the provisions of UNCLOS before considering China's unique claims.

After nearly ten years of intense negotiations, UNCLOS codified the international laws governing the high seas and territorial seas, attempting to strike a balance between the interests of coastal States and user States. UNCLOS made clear efforts to preserve the long established rights of user States in the world's oceans and seas. For instance Article 87 of UNCLOS promulgates freedom of the high seas, and provides all States with freedom of navigation and freedom of overflight rights, among other things.¹¹ For the coastal States, UNCLOS attempts to provide greater access to the natural resources offshore. For example, UNCLOS expanded the delimitation of the coastal States' territorial seas from three to 12 nautical miles.¹² More significantly, the Convention created three zones of coastal State jurisdiction that extend beyond the limits of the territorial sea, which are neither high seas nor

⁸ Armin Rappaport, William Earl Weeks, "Freedom of the Seas."

⁹ United Nations, "Historical Perspective", *United Nations Convention on the Law of the Sea*.

¹⁰ Hee Kwon Park, *The Law of the Sea and, Northeast Asia: A Challenge for Cooperation*, 1

¹¹ United Nations, Official Text, *United Nations Convention on the Law of the Sea*, 57

¹² *Ibid.* 27

territorial seas: the *contiguous zone*, the *continental shelf*, and the *exclusive economic zone* (EEZ).¹³ UNCLOS specifically delimits each zone. Article 76 of UNCLOS delimits continental shelves to 200 nautical miles from the territorial baseline (in certain cases it may extend out to 350 nautical miles).¹⁴ The dimensions of the EEZ are delineated in Article 57, which also extend from the territorial sea to a maximum of 200 nautical miles from a coastal State's shores. These new zones also created new overlapping jurisdictions, and resulted in a myriad of national claims, counterclaims and territorial sovereignty disputes over offshore resources.¹⁵ (Fig.1) Combined, these zones comprise nearly 38 percent of the world's oceans, encompassing an enormous area previously in the realm high seas.¹⁶ (Fig. 2)

While UNCLOS provides the coastal State the authority to extend its *jurisdiction* beyond its territorial sea, it also proscribes some important caveats. Article 56 declares that the coastal State's sovereign jurisdictions in the EEZ are limited for the purpose of exploring, exploiting, conserving, and managing its natural resources, including *marine scientific research*.¹⁷ Similarly, Article 76 states that the sovereign rights of the coastal State in its continental shelf are limited to exploration and exploitation of the non-living resources.¹⁸ Article 58 of UNCLOS preserves the rights of user States in the exclusive economic zone, noting that all States enjoy the freedoms of navigation and overflight referred to in article 87, "and other internationally lawful uses of the sea related to these freedoms...".¹⁹ Likewise, Article 78 states that the rights of the coastal state over the continental shelf do not affect the

¹³ Peter A. Dutton, "Charting a Course: US-China Cooperation at Sea", 13.

¹⁴ Official Text, United Nations Convention on the Law of the Sea, 53

¹⁵ UNCLOS, "Historical Perspective" *United Nations Convention on the Law of the Sea*.

¹⁶ Raul Pedrozo, "Close Encounters at Sea", 102

¹⁷ United Nations, Official Text, *United Nations Convention on the Law of the Sea*, 53

¹⁸ Ibid. 53

¹⁹ Ibid. 44

legal status of the superjacent (overlying) waters or of the air space above those waters.

Article 78 further states, "The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention."²⁰ The Convention also assigns duties to the State that exercises its rights. For example, Article 58 describes the duties of the user State thus: "In exercising their rights and performing their duties... in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law."²¹ Clearly UNCLOS seeks to balance the rights of the coastal States to exploit their offshore resources against the long held customary freedoms enjoyed by maritime powers to access the global maritime commons.

The PRC often cites the provisions of UNCLOS that it feels are to the coastal States advantage, such as Article 301, which provides for *peaceful uses of the seas*. Article 301 proclaims that all States "shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations."²² The PRC relies on a selective interpretation of the provisions of the Convention to assert its rights as a coastal State, but neglects its duty to extend due regard to other States operating in its EEZ. This goes against Article 300 which enjoins States to fulfill their obligations in *good faith*.²³

²⁰ Ibid. 54

²¹ Ibid. 44

²² Ibid. 138

²³ Ibid. 137

The PRC Interpretation of UNCLOS

It is important to examine the extent that China's expansive claims rely upon the internationally recognized provisions of UNCLOS. It is worth mentioning that the PRC is a signatory to the agreement, and that U.S. policy accepts UNCLOS as customary and binding international law.²⁴ In fact, UNCLOS has also been ratified by all rival states in the PRC's maritime disputes. Aside from any historical assertions, all claimants to the resources and territory of the South China Sea and East China Sea base their claims at least in part on the provisions of UNCLOS. In addition to its own historically based claims, The PRC bases its claims on both EEZ provisions and the continental shelf principle contained in UNCLOS.²⁵

Beijing has employed national scholars who use the language of UNCLOS to advance its legal arguments. For example, two of China's more notable legal scholars, Ren Xiaofeng and Cheng Xizhong of the China Institute for International Strategic Studies, have advocated the authority of the coastal State to restrict foreign military activity in its EEZ. In an article entitled "A Chinese Perspective", they argued that the EEZ is an area where "the traditional freedom of the high seas does not exist", and furthermore that freedoms of navigation and overflight (and other internationally lawful uses) enjoyed by other States in the EEZ may be restricted by coastal states using the rules of the Convention and other international laws.²⁶

While the authors acknowledge that UNCLOS provides for freedoms of navigation and overflight, they contend that military and reconnaissance activities constitute an abuse of that freedom. In their view, the freedoms of navigation and overflight do not include "... the freedom to conduct military and reconnaissance activities in the EEZ and its superjacent

²⁴ Peter A. Dutton, "Through a Chinese Lens", 13

²⁵ Peter A. Dutton, "Carving Up the East China Sea", 51

²⁶ Ren Xiaofeng and Cheng Xizhong, "Military and Intelligence Gathering Activities in the Exclusive Economic Zone", 140

airspace. Such activities encroach or infringe on the national security interests of the coastal State, and can be considered a use of force or a threat to use force against that State."²⁷ Ren and Cheng further state that military abuses of freedoms of navigation and overflight in the EEZ constitute a form of *battlefield preparation*. They liken it to "an electronic prelude to invasion and thus a threat to use force, and therefore not a "peaceful use" of the sea."²⁸

The provision for *peaceful use* under Article 301 is often misapplied by PRC scholars to decry the U.S. Navy's use of high sea freedoms in their EEZ; they characterize U.S. military activities as either internationally unlawful or incompatible with the provisions of the Convention.²⁹ Zhang Haiwen, Senior Researcher at the China Institute for Marine Affairs and Secretary of the Chinese Society of the Law of the Sea, has suggested that the concept of freedom of navigation has become obsolete.³⁰ In a recent article published in the Chinese Journal of International Law concerning the U.S. reconnaissance activities in the EEZ, Zhang Haiwen states, "I think the problem of the United States is not just a violation of Article 301 of the Convention, but also a violation of Article 300."³¹

Ren Xiaofeng and Cheng Xizhong propose two interpretations of the term "peaceful use" contained in Article 301. The first is for "complete non-military use" that is, permitting no military activity. The second would restrict the specific kinds of military activity allowed, that is, granting permission for some military activities, and prohibiting others.³² Beijing's view that routine military operations encroach on its national security rejects the customary view of what constitutes acceptable standards for military activities on the high seas. This

²⁷ Ibid. 141

²⁸ Ibid. 143

²⁹ Peter A Dutton, "Testimony" *The Implications of China's Naval Modernization for the United States*, 2

³⁰ Zhang Haiwen, "Is It Safeguarding the Freedom of Navigation or Maritime Hegemony", 37

³¹ Ibid. 45

³² Ibid. 143

overbroad interpretation is a gross and intentional misreading of the coastal State jurisdiction provided by UNCLOS, and would subject all military activity in the EEZ to PRC purview.

PRC National Law

While the PRC relies on selective interpretation of international laws, it has also crafted corresponding national laws. In 1992, Beijing promulgated a domestic law regarding its territorial waters entitled; “*Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone*”³³ This law ignored rival State claims by staking its sole right to sovereignty over highly disputed territories. In Article 2, for example, the PRC law states: "The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands belonging to the People's Republic of China." ³⁴ (Fig. 3)

China's misapplication of domestic law to address an international dispute was a new development. Beijing's misuse of the law to achieve its strategic objective was only the first salvo in its new concept of legal warfare. Not only did Beijing's national law dismiss rival State claims, it made the occupation, commercial development, and military activities in the surrounding areas illegal according to Chinese law. In 1998, after it had already ratified UNCLOS, the Standing Committee of China's National People's Congress adopted the “*Exclusive Economic Zone and Continental Shelf Act*”.³⁵ More recently, in 2009 the National People's Congress approved the “*Law on Island Protection*”, which gave the PRC broad

³³ Peter A. Dutton, "Through a Chinese Lens", 26

³⁴ PRC, *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone*

³⁵ Ibid.

jurisdictional authority over all its claimed offshore islands, including ownership and administrative oversight over uninhabited islands.³⁶ In its several attempts to fashion domestic laws to make international sovereignty claims, China has exceeded its coastal State jurisdiction allowed by international law. Beijing's unique perspective on legal warfare could explain its methodical use of domestic law to claim disputed maritime territories, and subsequently their territorial seas, continental shelves, and exclusive economic zones.³⁷

Historical Claims

Customary international law to assert its claims allows coastal States jurisdiction over water space or islands when the claim has been open and long-standing, exclusive, and widely accepted by other states.³⁸ The PRC may believe customary law is another way to claim lawful sovereignty over some of the disputed maritime territories. The legality of China's territorial claims is based partly on historical records from as early as the East Han Dynasty (23-220).³⁹ China has historically claimed nearly the entire expanse of the South China Sea (SCS), including all of the Spratly, Paracel, and Pratas Islands ("Nansha", "Xisha", and "Dongsha" Islands respectively in Chinese).⁴⁰ Of the most contested SCS territories claimed by China, the Spratly Islands are also claimed by the Philippines, Taiwan, Vietnam, and Malaysia, while the Paracel Islands are also claimed by Vietnam and Taiwan.⁴¹ According to one scholar's opinion in the *Chinese Journal of International Law*, "China's claims to the South China Sea Islands and the adjacent waters are supported by both historical facts and

³⁶ Peter A. Dutton, "Through a Chinese Lens", 26

³⁷ Ibid.

³⁸ Ibid.

³⁹ Jianming Shen, China's "Sovereignty over the South China Sea Islands" 98-99

⁴⁰ Ibid. pp.101-102

⁴¹ Ralf Emmers, "Maritime Disputes in the South China Sea", 1

rules of international law pertaining to the acquisition of territorial sovereignty. China has always taken the Nansha Islands, the Xisha Islands, Zjiongsha Islands and Dongsha Islands and the adjacent waters as part of the Chinese territory and waters.”⁴² China’s present day claims in the South China Sea rely partly on historical charts from 1947. The Nationalist government of Chiang Kai-shek defined China’s claims as an area delineated by nine dash marks on a map that circumscribed nearly the entire South China Sea.⁴³ The “nine-dotted line” proclaimed China’s sovereignty over all of the South China Sea Islands, and established its maritime boundary in the South China Sea. (Fig. 5) Present day scholars Li Jinming and Li Dexia from the School of Southeast Asian Studies at Xiamen University have supported the PRC’s claims by suggesting that territorial sovereignty can be based on international customary law concerning *historic waters*. They cite the three factors that are required for a state to successfully argue its claim to historic waters: “(1) States which claim historic title should exercise sovereignty in the waters; (2) The exercise of sovereignty should have been continuous for a long time and should have become the usage; and (3) It should be tolerated by other states”.⁴⁴ The authors argue that, where a *historic waters* claim is successful, the jurisdiction within the area is exclusive, i.e. the claimant state may hold it as *internal waters* or *territorial seas*.⁴⁵ Their argument is undermined by the fact that its historical claims are vehemently contested by other States in the region on the grounds of sovereignty.

The Chinese viewpoint suggests that their domestic laws set a precedent that supersedes international law. This illustrates the PRC’s revisionist desire to shift legal opinion away from of existing laws protecting freedom of navigation and overflight, towards

⁴² Jianming Shen, *China’s Sovereignty over the South China Sea Islands: A Historical Perspective*, p.102

⁴³ Li Jinming and Li Dexia, “The Dotted Line on the Chinese Map of the South China Sea: A Note”, 292

⁴⁴ Ibid. 292

⁴⁵ Ibid. 292

increased coastal State authority. In their words, “Though some states object to China’s claim of historic rights and criticize it as not being in conformity with international regulations, *China has set a precedent in the state practice relating to historic rights* [emphasis added]. It is not clear whether China’s practice establishes a rule in international law, but it may already be influencing the development of the concept of historic rights.”⁴⁶ China may prefer to argue the concept of *historic waters* because it is an ill-defined aspect of international law, and is essentially overlooked in UNCLOS.⁴⁷ This is one way the PRC believes it can pursue a sovereign claim to at least some of the disputed maritime territories, and from there it can exercise the expanded jurisdictional authority under the provisions of UNCLOS. This strategy could be considered a practice of the PRC's concept of legal *warfare*.

The Legal Warfare Concept

The aggressiveness of Beijing's maritime strategy takes a comprehensive view of warfare in pursuit of its security interests. In the 2007 Annual Report to Congress on the Military Power of the People’s Republic of China, it says PRC military strategists have shown an interest in using international law as an instrument to deter adversaries prior to combat.⁴⁸ In the same report, it states that the PLA’s multidimensional view of warfare is "not only a military struggle, but also a comprehensive contest on fronts of politics, economy, diplomacy, and law.”⁴⁹

⁴⁶ Ibid. 292

⁴⁷ Dutton, Peter, "Through a Chinese Lens", 25

⁴⁸ U.S. Office of the Secretary of Defense, *Annual Report to Congress, Military Power of the People’s Republic of China, 2007*, 13

⁴⁹ Ibid. 13

In 1999, two senior officers of the People's Liberation Army (PLA) proposed a new and controversial theory of modern warfare in a book titled *Unrestricted Warfare*. In their book, they described a comprehensive use of a type of *non-military warfare* that included *international law warfare* to achieve strategic ends.⁵⁰ James Kraska, an international law professor at the U.S. Naval War College, has observed that Beijing views the proliferation of international laws and regulations as a critical vulnerability for the United States.⁵¹ Wang Xiangsui, one of the two authors of *Unrestricted Warfare*, was reported to have remarked in an interview with a member of the Western press, “We are a weak country, so do we need to fight according to your rules? No.”⁵² In a Clausewitzian sense, the PLA has identified the rule of law as a center of gravity for the United States' military.⁵³

The term *lawfare* has only recently come into common use, but the transformational role of law is obvious to anyone involved in matters of national security and international law.⁵⁴ Major General Charles J. Dunlap, Jr., a former U.S. Air Force Deputy Judge Advocate General, first coined the term in a 2001 essay. In that essay, he defined the term to mean “the use of law as a weapon of war”.⁵⁵ Dunlap more specifically describes lawfare as “a method of warfare where law is used as a means of realizing a military objective.” Dunlap's current definition is, “the strategy of using - or misusing - law as a substitute for traditional military means to achieve an operational objective.”⁵⁶ However, there is no consensus on the use of the term *lawfare*. Peter Dutton, Professor of Strategic Studies in the China Maritime Studies

⁵⁰ Qiao Liang and Wang Xiangsui, *Unrestricted Warfare*, 55-56

⁵¹ Kraska, James, "Sovereignty at Sea." *Survival: Global Politics & Strategy* 51(3), 13-18, International Institute for Strategic Studies, London, June-July, 2009, p. 14

⁵² John Pomfret, “China Ponders New Rules of Unrestricted War, A1.

⁵³ William Eckhardt, “Lawyering for Uncle Sam When He Draws His Sword”, 431

⁵⁴ Charles J. Dunlap Jr., "Lawfare: A Decisive Element of 21st-Century Conflicts?", 35

⁵⁵ Ibid. 35

⁵⁶ , Charles J Dunlap Jr., “Lawfare Today”, 146

Institute at the U.S. Naval War College, believes that a more correct term would be *legal warfare*, because it is the preferred doctrinal term used by the PLA in its own publications.⁵⁷ In 2003, the Communist Chinese Party (CCP) central Committee adopted *Three Warfares*, an information warfare concept which comprises Psychological Warfare, Media Warfare, and *Legal Warfare*. China developed the concept to shape international opinion and interpretation of international law.⁵⁸ Whatever the term may be, Beijing has embraced a concept that would use the law to achieve military objectives.

As part of its strategic communications, the government in Beijing has become louder and clearer in its proclamations of territorial sovereignty. In April of 2010, party officials went so far as to name the South China Sea a "core interest" that they view much in the same way as they do Tibet or Taiwan.⁵⁹ More recently, Beijing warned the U.S. to keep its aircraft carrier USS George Washington out of the Yellow Sea. The official Xinhua news agency quoted a researcher at the PLA naval academy as saying that the Yellow Sea was "pivotal to China's core interests, given that it is related not only to the extension of the country's maritime rights but also to its maritime security."⁶⁰ Beijing has the extraordinary lengths it is willing to go to lodge regulate the presence of the U.S. Navy in its EEZ, even arguing that the use of sonar could be harmful to its marine life.⁶¹ Sometimes the PRC goes beyond mere objections. There have been some very well publicized incidents of Chinese interference with the lawful operations of U.S. Navy ships, auxiliary vessels, and reconnaissance aircraft. As

⁵⁷ Peter A. Dutton, personal interview with the author, 18 October 2010

⁵⁸ Office of the Secretary of Defense, *Annual Report to Congress*, 26

⁵⁹ New York Times, "Chinese Military Seeks to Extend Its Naval Power" April 24, 2010

⁶⁰ Michael Richardson, "Will intimidation win China the Yellow Sea?"

⁶¹ Raul Pedrozo, personal interview with the author, 18 October 2010

recently as March 2009, the USNS Impeccable was harassed by 5 PRC vessels.⁶² China's response to U.S. protests was that the presence of the Impeccable was a violation of PRC international and domestic law.⁶³ A more serious incident occurred in April of 2001, when a PLA naval F-8 fighter collided with a U.S. Navy reconnaissance plane operating in international airspace over the South China Sea. Beijing responded by protesting the unlawful violation of its airspace, and held the U.S. Navy crew for eleven days while the PRC Foreign Ministry demanded an official apology.⁶⁴

Beijing does not have the authority to restrict military activities in the EEZ under international law. UNCLOS does not restrict intelligence collections in the EEZ. UNCLOS only mentions regulations prohibiting intelligence collection once - for ships conducting innocent passage in the territorial sea.⁶⁵ Beijing characterizes U.S. military operations in its EEZ as being illegal, because it understands how highly Western powers value the rule of law.⁶⁶ This practice of objecting on the grounds of legality abuses Western society's respect for the rule of law; Beijing essentially demands international compliance with its national laws to pursue its national geostrategic interests. This may illustrate how the PRC intends to apply legal warfare to succeed in its efforts to secure offshore resources and improve its regional security capabilities.

Geostrategic Security Interests

Beijing's geostrategic ambitions could have far reaching repercussions. The frictions between the U.S. and the PRC are generally framed by both parties in terms of the laws of

⁶² Raul Pedrozo, "Close Encounters at Sea", 101

⁶³ Ibid., 102

⁶⁴ Shirley A. Kan, "China-U.S. Aircraft Collision Incident of April 2001", 1

⁶⁵ Raul Pedrozo, "Close Encounters at Sea", 101

⁶⁶ Eckhardt, William George, "Lawyering for Uncle Sam When He Draws His Sword", 4

the Convention; yet it is not really about the correct interpretation of the law, but rather about their conflicting geostrategic interests.⁶⁷ Peter Dutton proposes that China's interests can be summarized as *three objectives*: sovereignty, resources, and controlled access to its near seas.⁶⁸ The United States' interests are to assert its lawful rights to freedom of navigation and overflight, and to maintain a stabilizing presence in the region. The danger is that the PRC could set a precedent for other littoral states. James Kraska notes that China is the vanguard of States seeking to transform their EEZs, "from simple areas of resource rights and jurisdiction into something akin to territorial seas, restricting foreign military operations in more than one-third of the world's ocean area through assertions of sovereignty".⁶⁹

The implication of China's concerted actions is that if left unchallenged, it would make China the gatekeeper of all military traffic that passes through water space containing critical sea lines of communication and the airspace above it, with enormous consequences for the strategic environment.⁷⁰ The PRC is attempting to carve out an exception for itself with respect to international laws that preserve traditional freedoms of navigation. The PRC, by enacting domestic legislation that is inconsistent with international law, misreading the text of UNCLOS, and dismissing decades of state practice, attempts to justify its narrow interpretation to exercise greater authority over activities within the EEZ. The PRC strategy is counterproductive to its security objectives - and will promote a destabilizing influence in the region in the larger maritime community. Ironically, China's actions may create a security dilemma, causing regional military escalation and diplomatic balancing measures by its neighboring States that it hopes to avoid.

⁶⁷ Dutton, Peter, "Through a Chinese Lens," 25

⁶⁸ Peter A. Dutton, personal interview with the author, 18 October 2010

⁶⁹ Kraska, James, "Sovereignty at Sea." 14

⁷⁰ Ralf Emmers, "Maritime Disputes in the South China Sea" 1

Obstacles to Peaceful Resolution

Former Chinese Premier Wen Jiabao first advanced the phrase “peaceful rise” to describe his country's ascendant role in world affairs during a speech at Harvard University in December 2003.⁷¹ Since that time, the phrase has rapidly become part of the popular lexicon; a search on the “rise of China” on the Google website today will yield nearly seventy-six million results. The PRC has made extraordinary diplomatic efforts to assure regional powers and the broader international community that its rise is indeed peaceful, yet it has also at times resorted to aggressive military action and coercive diplomatic posturing over disputed ocean territories. Its concept of legal warfare makes it increasingly clear what “peaceful” means China will likely use to achieve its geopolitical objectives.

The intractability in resolving maritime territorial disputes in China’s near seas lies in the dissonance between an aggressive China that seeks to assert its *indisputable* sovereignty and a China that seeks a diplomatic solution in accordance with its *peaceful rise*.⁷² The Association of Southeast Asian Nations (ASEAN) has emerged as an important forum for dialogue between China and the other South China Sea claimants.⁷³ Despite Beijing's charm offensive *vis-a-vis* rival ASEAN claimants, The PRC has applied the ambiguous position of *diplomatic posturing*,⁷⁴ and has bided its time.

Beijing may not want to resolve the dispute, or see any advantage to settle the disputes multilaterally. By maintaining a *status quo* of controlled conflict, especially in its dispute with Japan, China gains the levers of nationalism to balance its domestic and regional

⁷¹ Harvard Gazette, “Remarks of Chinese Premier Wen Jiabao: ‘Turning Your Eyes to China’ ”

⁷² John Pomfret, “Beijing claims ‘indisputable sovereignty’ over South China Sea”, A07

⁷³ The U.S. Energy Information Administration, “Country Analysis Briefs”

⁷⁴ Rita Akpan, “China, The Spratly Islands Territorial Dispute and Multilateral Cooperation” 4

political message.⁷⁵ The tensions between China and rival states over the resources, territorial boundaries, and sovereignty remain unresolved. While UNCLOS has provided the legal framework for coastal nations to assert their maritime interests, it is unenforceable, and presents conflicting issues such as overlapping claims which it leaves to the individual claimants to resolve. China has resisted multilateral negotiations, and consistently stated its preference to resolve issues of sovereignty on a bilateral basis, where it can leverage its relative advantages in economic soft power backed by an increasingly capable and intimidating navy. China has temporarily shelved its disputes while building up its naval strength. Beijing prefers to deal with its neighbors on a bilateral basis, and continues to strenuously oppose any external interference, especially from the United States.⁷⁶

The Way Ahead: Recommendations

The United States should actively engage China to preserve its freedoms of navigation and overflight in the PRC's exclusive economic zones. The U.S. can strive to deepen and improve its military ties with China, including high-level consultations and military-to-military exchanges. There were three such meetings this year: the U.S.-China Defense Consultative Talks (DCT), the U.S.-China Defense Policy Coordination Talks (DPCT), and the ongoing Military Maritime Consultative Agreement (MMCA).⁷⁷ The forums are positive steps that provide both parties the opportunity for constructive dialogue. Unfortunately, Beijing is likely to suspend talks indefinitely in protest over sensitive issues like U.S.-Taiwan relations. Even so, the U.S. should continue unambiguous strategic communications to make

⁷⁵ Peter A. Dutton, "Carving Up the East China Sea", 65

⁷⁶ Yajun Zhang and Victoria Ruan, "China Rejects U.S. Suggestion for ASEAN Mediation on Territory"

⁷⁷ Office of the Secretary of Defense, *Annual Report to Congress*, 10

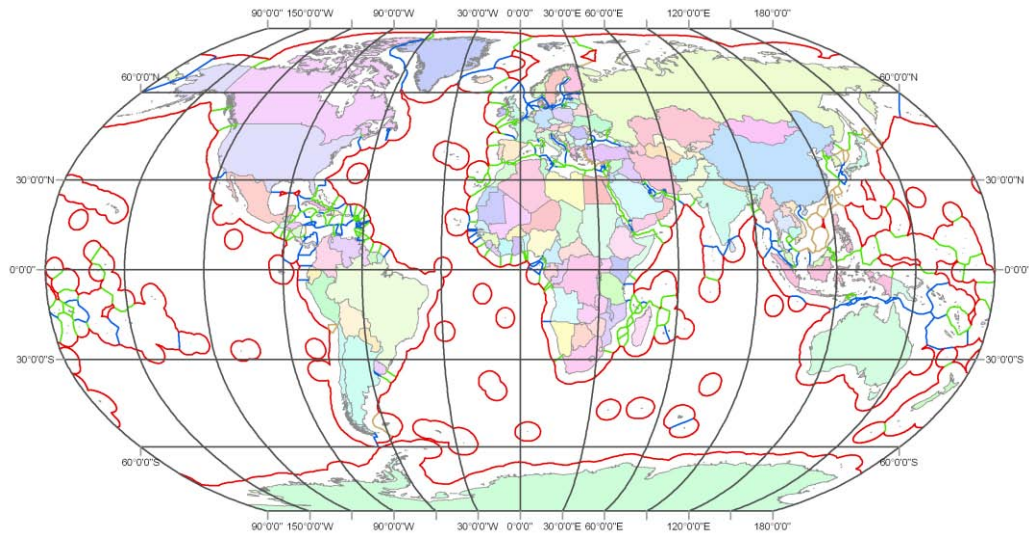
it clear to China that it is committed to protecting freedoms of navigation and overflight provide under law. The vast majority of states are alignment with the U.S. interpretations of the legal rights and duties in the EEZ.⁷⁸ Moreover, the U.S. should not acquiesce to the unilateral demands by China that restrict the rights and freedoms of navigation and overflight, but should instead continue to exercise and assert those freedoms as provided by the law of the sea. To demonstrate its resolve, the U.S. should continue to exercise its freedoms by continuing its reconnaissance, military surveillance, and joint combined operations with allies in the China seas. For example, Beijing's warnings should have been politely ignored, and the USS George Washington should have proceeded with the planned exercises in the Yellow Sea with its South Korean ally.

Lastly, while it has long operated within its dictates of the law of the sea, the U.S it should now ratify UNCLOS. Admiral Willard, Commander, U.S. Pacific Command, recently testified that non-party status to UNCLOS is a constraint for the U.S. Navy. Ratifying UNCLOS would add credibility to U.S. leadership in freedom of navigation issues, and remove a common criticism from the PRC repertoire. It would also allow the U.S. to reclaim its role as the lead advocate for freedom of navigation rights as provided by the tenets of the Law of the Sea. Non-ratification abdicates leadership to China, which already sits as judge on the International Tribunal for the Law of the Sea.⁷⁹ The seas are vital to the economic and security interests of both the United States and The PRC. The traditional freedoms of the sea are not static; it will take a strong commitment by freedom loving nations to preserve freedoms of navigation and overflight going forward.

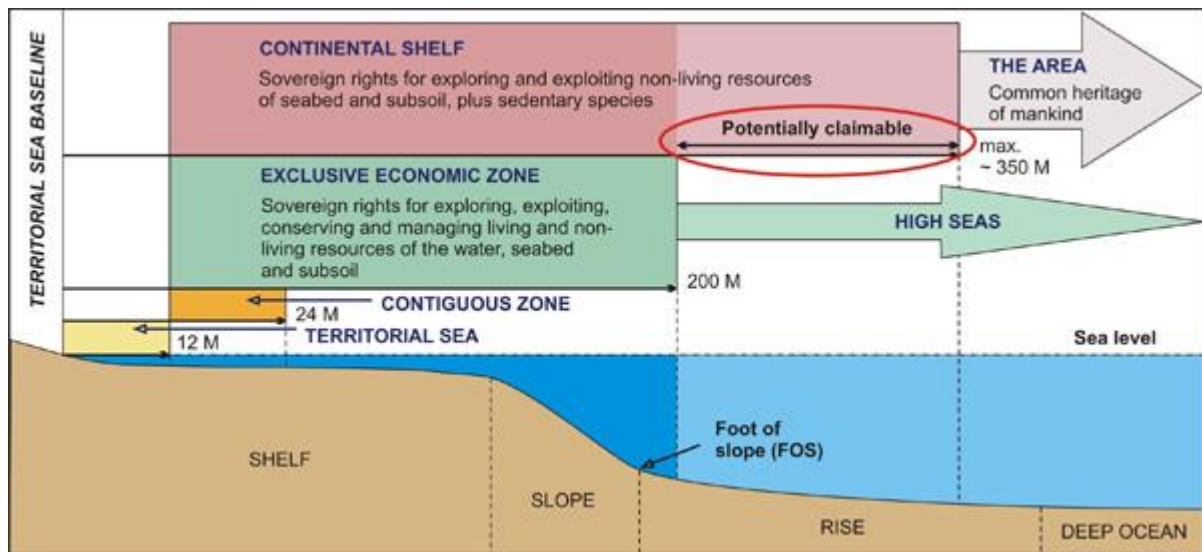
⁷⁸ Peter Dutton, "United states Senate Committee on Foreign Relation Hearing on Maritime Disputes and Sovereignty in East Asia - Testimony of Peter Dutton", 9

⁷⁹ Kraska, James, and Wilson, Brian, China Wages Maritime "Lawfare", Foreign Policy, March 12, 2009, http://experts.foreignpolicy.com/posts/2009/03/11/china_wages_maritime_lawfare

ILLUSTRATIONS



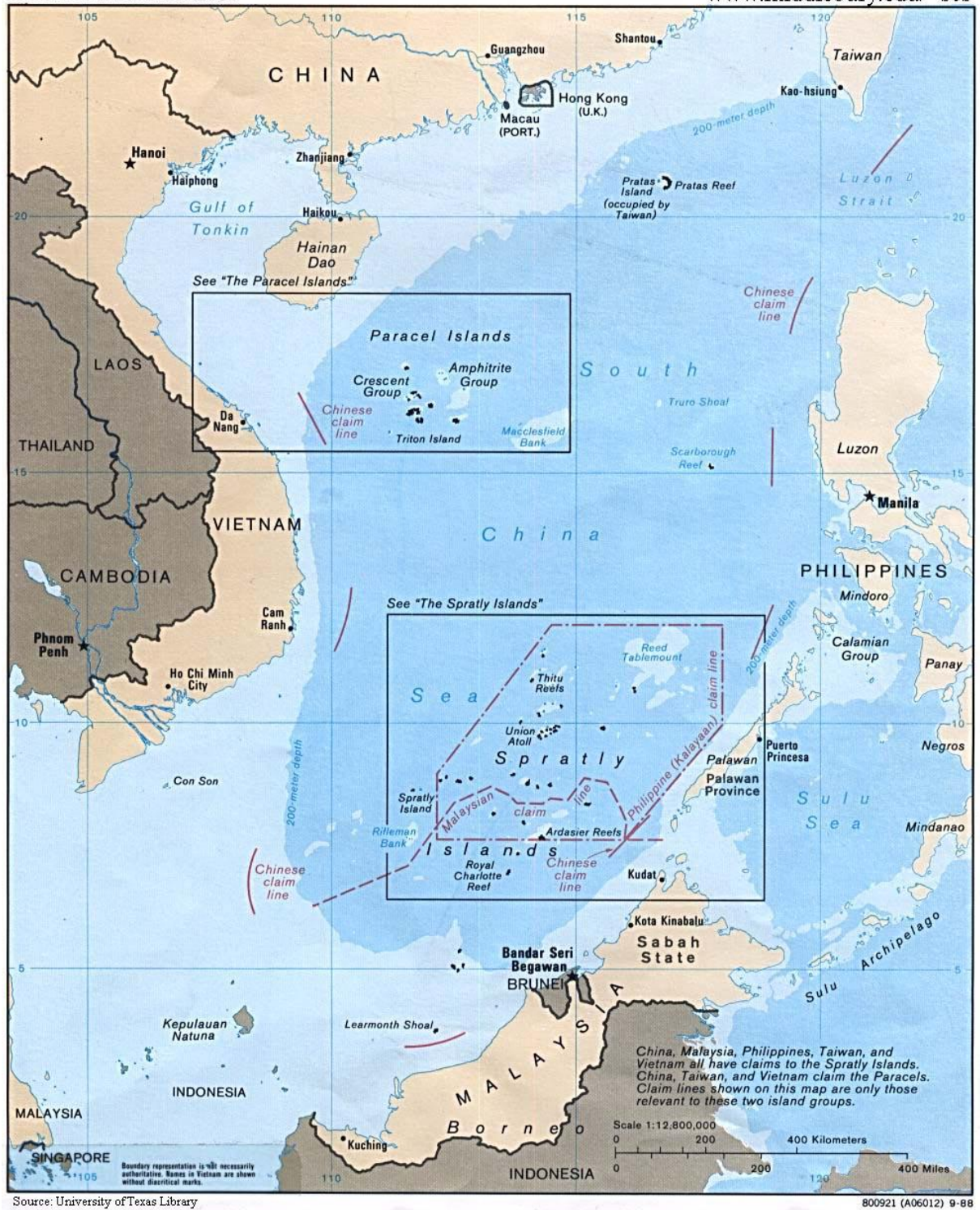
(Figure 1.) Exclusive Economic Zones⁸⁰



(Figure 2) UNCLOS and Article 76⁸¹

⁸⁰ Reprinted from: (Vlaams Instituut voor de Zee, Maritime Boundaries Geodatabase, version X). <http://www.vliz.be/vmcddata/marbound/images/Marboundv5clip.png> (accessed 24 October 2010).

⁸¹ Reprinted from: (Bundesanstalt für Geowissenschaften und Rohstoffe (BGR) in Hannover "UNCLOS and Article 76"). http://www.bgr.bund.de/EN/Themen/TZ/TechnZusammenarb/Bilder/tzp__seerechtskonventionen__k__en,property=default.jpg (accessed 24 October 2010).

(Figure 3) South China Sea Islands⁸²

⁸² Reprinted from: (The University of Texas at Austin, Perry-Castañeda Library Map Collection, *South China Sea (Islands)* 1988).

http://www.lib.utexas.edu/maps/middle_east_and_asia/schina_sea_88.jpg (accessed 26 October 2010)



Map 2: Official Chinese map of the South China Sea with the nine-dotted line

Source: The Traffic and Tourist Map of Hainan, 1999.

Adapted from Stein Tonnesson, "China and the South China Sea: A Peace Proposal," *Security Dialogue*, vol. 31, no. 3, September 2000

(Figure 4) Nine-Dotted Line⁸³

⁸³ Reprinted from: (Stein Tonnesson, "China and the South China Sea", 3 September 2000).
http://www.southchinasea.org/9-dotted%20map/map_small.gif

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